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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1359

GEORGE T. STEVELOFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. ----------.

GEORGE Y. STRIBLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

George Y. Stribling, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on February 10, 1971.

OPINIONS BELOW.

The majority opinion of the United States Court of Appeals for the Sixth Circuit, and the dissenting opinion thereto, are reprinted in Appendix A, are reported in 71-1 U.S. Tax Cas. ¶9210, and are not yet reported in the Federal Reporter. The judgment of the Sixth Circuit reversing the United States District Court, filed on February 10, 1971, is reprinted in Appendix B. The oral opinion of the United States District Court for the Northern District of Ohio, Eastern Division, given in open court on April 3, 1970, is printed in Appendix C and is not reported in any report. The order of the District Court, filed on April 9, 1970, is reprinted in Appendix D.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 10, 1971. The Court of Appeals recalled its mandate on March __, 1971, pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Is a taxpayer who without his knowledge has been under investigation for several months by the Internal Revenue Service for criminal violation of the Internal Revenue Code, affirmatively misled if he is then advised by the Internal Revenue Service only that it is conducting a routine audit to determine the correctness of his amended tax returns for the years 1959-1961, and if the Internal Revenue Service during the audit obtains from him incriminating information and documentary evidence which is the basis for a criminal prosecution against the taxpayer for criminal violation of the Internal Revenue Code involving those same years 1959-1961?

2. If a taxpayer is affirmatively misled by the Internal Revenue Service and as a consequence thereof incriminates himself, do his constitutional rights against self-incrimination and illegal search and seizure, and also the concept of justice and fair play, require suppression of the incriminating evidence obtained from him by the Internal Revenue Service?

3. If a taxpayer who without his knowledge has been under investigation for several months by the Internal Revenue Service for criminal violation of the Internal Revenue Code, is contacted by the Internal Revenue Service to obtain information and documentary evidence from

him, does the Internal Revenue Service have a duty to advise the taxpayer of his constitutional right to remain silent and that anything he says can be used against him in a court of law?

4. Can the Internal Revenue Service in a criminal tax investigation of a taxpayer lawfully utilize the power of civil summons contained in Title 26 U.S.C. § 7602 to compel the taxpayer to appear and testify before a Special Agent?

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATION INVOLVED.

The constitutional provisions involved are the self-incrimination clause and the illegal search and seizure provision of the due process clause of the fifth amendment to the United States Constitution. The statute pertaining to the authority of the Secretary of the Treasury to issue summons is Internal Revenue Code of 1954, Section 7602, 26 U.S.C. § 7602. The regulation setting forth the functions and duties of the Intelligence Division of the Internal Revenue Service as being the enforcement of criminal statutes is Internal Revenue Service, Statement of Organization and Functions, 65-2 Cum. Bull. Section 1118.6, at 948 (1965). (See Appendix E.)

STATEMENT OF THE CASE.

Petitioner, George Y. Stribling, was indicted in March, 1966 in the Western District of Washington, Southern Division, on three counts of willful attempted evasion of his individual income tax for the years 1959, 1960 and 1961, in violation of Section 7201 of the Internal Revenue Code of 1954. On April 21, 1966, on the petitioner's motion the case was transferred to the United States District Court for the Northern District of Ohio, Eastern Division.

Jurisdiction of the District Court was based on Title 18, U.S.C. Section 3231.

Petitioner filed a motion to suppress evidence, and an extensive hearing was had on said motion in the District Court beginning March 20, 1970. The following facts were elicited at the hearing (as related in the dissenting opinion herein of Celebrezze, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Appendix A, pp. 28-29):

"[Unknown to Appellee] In February, 1963, the Intelligence Division of the Internal Revenue Service began an investigation of the Appellee with a view toward determining whether or not he should be criminally prosecuted for violations of the Internal Revenue Code. Under compulsion of a summons which was issued pursuant to 26 U.S.C. § 7602 (1964) and which purportedly concerned an employee of the Appellee, the Internal Revenue Service sent out a Special Agent to interview the Appellee. That interview which took place in March, 1963, set off a chain of investigations [unknown to Appellee] of the Appellee's activities in Chicago, Illinois, Seattle, Washington, Cincinnati, Ohio, and Kentucky. By late August, 1963, the Internal Revenue Service Assistant Regional Commissioner in Cincinnati, whose jurisdiction covers a five state area including all of Kentucky and Ohio, was sent a report on the Internal Revenue Service's widespread investigation of Appellee's activities. While this investigation [unknown to Appellee] was taking place, the Appellee filed amended returns.

"In response to the filing of Appellee's amended returns, the Canton office of the Internal Revenue Service sought to requisition the Appellee's tax returns and was informed that the material requested was in the hands of a Special Agent of the Intelligence Division for the past several months. There is no indication in the record that

the Canton office made any further inquiry as to the status of the Intelligence Division's investigation into the Appellee's affairs. Indeed, the Canton office did not even inquire to its Regional Office in Cincinnati concerning the status of the Internal Revenue Service's investigation on the Appellee. Had the Canton office followed up on this matter, they would have been made aware of the multi-state investigation for tax fraud which the Intelligence Division was pursuing. Instead, the Canton office ordered Agent Kast to interview the Appellee with respect to his amended tax returns for the years 1959-62.

"Agent Kast met with the Appellee and his tax lawyers several times in November and December, 1963 and affirmatively represented to the Appellee that his purpose in conducting those interviews was to determine the correctness of Appellee's *amended* returns for the years 1959-62. Agent Kast did not express any intention to audit Appellee's *original* returns or to gain facts which might be used against the Appellee in a criminal prosecution based on his *original* returns. While Agent Kast may have believed his statements to the Appellee were true because his own superiors did not inform him of the continuing criminal investigation, there can be no question these affirmative statements misrepresented the position of the Internal Revenue Service with regard to the Appellee. The Appellee testified under oath that he would never have volunteered the records or information he provided Agent Kast had he known such information could have been used against him in a criminal prosecution or had he known that the Internal Revenue Service had begun investigating the possibility of a criminal indictment based on his *original* returns several months before the Kast interviews. Appellee testified he offered the records and volunteered the information he gave so that the Internal

Revenue Service could fairly determine the accuracy of his *amended* returns as Agent Kast had indicated to him was the purpose of his visit."

Petitioner's motion to suppress evidence was granted by the District Court in an oral opinion rendered April 3, 1970. The District Court's judgment was filed on April 9, 1970.

The Government appealed from the District Court's order granting petitioner's motion to suppress evidence, and by a 2-1 decision the United States Court of Appeals for the Sixth Circuit reversed the District Court's order, on February 10, 1971.

REASONS FOR GRANTING THE WRIT.

The practical effect of the Court of Appeals' decision in this case is to permit the Internal Revenue Service to obtain incriminating evidence from a taxpayer with respect to whom, unknown to him, it is already conducting a criminal investigation, under the guise that it is conducting a routine audit to determine the correctness of his tax returns. This type of conduct on the part of the Internal Revenue Service could adversely affect the constitutional rights of countless taxpayers if permitted to continue unrestrained by this Court.

In addition to the great importance and interest to the public which this case has in view of its probable consequences on other taxpayers besides the petitioner, the decision should be reviewed by this Court because it conflicts with decisions of other courts in principle and on important matters of general law. It is a well established legal principle that the Internal Revenue Service cannot lawfully mislead a taxpayer into believing that another person (petitioner's employee), *and not him,* is being investigated, or that an exclusively civil investigation is

being conducted of the taxpayer's activities, whereas in fact an undisclosed criminal investigation of him by the Internal Revenue Service has already been underway for quite some time, and thereby obtain incriminating evidence from the taxpayer through such guile. The United States Court of Appeals for the Eighth Circuit in the case of *Cohen v. United States,* 405 F. 2d 34, at 36 (8th Cir. 1968), stated:

> "We * * * reiterate our warning in *White v. United States,* 395 F. 2d 170 (8th Cir. 1968), that agents must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in character and will not lead to criminal charges."

The United States Court of Appeals for the Fifth Circuit in *United States v. Prudden,* 424 F. 2d 1021, at 1032 (5th Cir. 1970), stated:

> "We explicitly reject the government's contention that the agents were free to use fraud, deceit or trickery. In cases where the IRS agents are obtaining consent to examine documents, they cannot gain such consent by affirmatively misrepresenting the nature of the search."

Also see *United States v. Wheeler,* 149 F.Supp. 445, at 450 (W.D.Pa. 1957), *rev'd on other grounds,* 256 F. 2d 745 (3rd Cir. 1958); *United States v. Lipshitz,* 132 F.Supp. 519 (E.D.N.Y. 1955); *United States v. Guerrina,* 112 F. Supp. 126 (E.D. Pa. 1953); *Goodman v. United States,* 285 F.Supp. 245 (C.D. Cal. 1968); *In the Matter of Bodkin,* 165 F.Supp. 25 (E.D.N.Y. 1958).

The decision by the Court of Appeals in the instant case is crearly in conflict with the general principle enunciated in the above cases. The majority of the Court of Appeals refused to consider that the Internal Revenue Service *as an entity* misled the taxpayer in this case (peti-

tioner), and instead only considered whether one particular agent (Kast) individually and knowingly misled the petitioner. This is clearly erroneous, as is aptly shown by the dissenting opinion of Judge Celebrezze (Appendix A, p. 30):

> "The majority concedes that Agent Kast affirmatively represented to the Appellee that the limited purpose of his audit and interviews was to determine the correctness of Appellee's amended returns. Those statements by Agent Kast served to affirmatively mislead the Appellee into volunteering information which he would not otherwise have given. *The fact that Agent Kast was not informed* by his immediate superiors at the Canton Field Office or by his superiors in the Cleveland District Office or in the Cincinnati Regional Office that a continuing nationwide criminal investigation of Appellee had been in progress for a period of several months *cannot be used as a shield if in fact his misleading statements deceived the Appellee.* The District Court so found. *An agent of a field office of the Internal Revenue Service must be held answerable for information which his immediate superiors should have discovered and which his district and regional offices clearly possessed.*" (Emphasis added.)

Obviously the majority of the Court of Appeals failed to consider that the effect on a taxpayer who is misled and thereby furnishes incriminating evidence to the Internal Revenue Service is still the same regardless of whether the misleading by the Service was by design or unintentional. As stated in the case of *United States v. Guerrina,* 112 F.Sup. 126, at 129 (E.D.Pa. 1953):

> "Whether the arrangement to have Agent Coram make the appointment with the defendant was *by design* to obtain entrance for Special Agent Pearson, *or whether it was done innocently, the effect in so far as the defendant was concerned was the same.* He

> was deluded into giving consent to the examination of his papers and records and his action in so doing *cannot be said to be voluntary* in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes." (Emphasis added.)

Also, the majority of the Court of Appeals failed to recognize that this case is *different* from the many cases where *after* a civil audit of a taxpayer by the Internal Revenue Service was underway, a criminal investigation of the taxpayer is initiated by the Internal Revenue Service *at some later point in time*. In the instant case, the Internal Revenue Service was conducting a criminal investigation of the taxpayer, unknown to him, and after that investigation had been in process for several months, the Internal Revenue Service then advised the taxpayer that it was conducting a routine audit of his returns. This highly significant distinction, which the majority of the Court of Appeals ignored, is referred to in the case of *United States v. Wheeler,* 149 F.Supp. 445, 450 (W.D.Pa. 1957), *rev'd on other grounds,* 256 F.2d 745 (3rd Cir. 1958):

> "[T]he law distinguishes between the failure on the part of a government investigator to disclose the purpose of his investigation *at its inception when suspicion of criminal wrongdoing exists* and the discovery of criminal wrongdoing in the course of a routine investigation. * * *" (Emphasis added.)

As of the present time, this Court has not passed upon these important questions relating to the rights of taxpayers to be protected from furnishing incriminating evidence to the Internal Revenue Service through the Service's misleading representation that a routine audit is being conducted, when in actual fact the Internal Revenue

Service is, and has been for quite some time, conducting a criminal investigation of the taxpayer.

Nor has this Court passed upon the related but different question as to whether, in the case of a taxpayer under criminal investigation by the Internal Revenue Service who is contacted by the Service to obtain information and documentary evidence from him, the Internal Revenue Service has a duty to advise the taxpayer of his constitutional right to remain silent and that anything he says can be used against him in a court of law. On this point the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is in conflict with the principle of the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Dickerson,* 413 F.2d 1111 (7th Cir. 1969).

Also, the decision of the Court of Appeals in the instant case, insofar as it upholds the legality of the Internal Revenue Service using the power of civil summons under 26 U.S.C. §7602 in a criminal tax investigation to compel the taxpayer to appear and testify before a Special Agent, is in conflict with the principle stated by this Court in *Reisman v. Caplin,* 375 U.S. 440, at 449 (1964).

In summary, it is apparent that the decision of the Court of Appeals in the instant case is erroneous and departs from accepted and usual principles in several respects, and effectively deprives this petitioner and other taxpayers of their constitutional rights against self-incrimination and illegal searches and seizures when confronted by the Internal Revenue Service, and conflicts head-on with the established concept of justice and fair play. The District Court's decision, to the effect that under the circumstances of this case the petitioner did not knowingly waive his constitutional rights and freely and voluntarily disclose information, records and documents to

the Internal Revenue Service, is correct and should have been affirmed by the Court of Appeals.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE COURT OF APPEALS.

No. 20,453.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GEORGE Y. STRIBLING,
Defendant-Appellee.

APPEAL from United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed February 10, 1971.

Before WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. The Government has appealed from a suppression order entered by the District Court in a criminal tax case. The appeal was taken under the authority of 18 U.S.C. § 3731, as amended by Title VIII of the Omnibus Crime Control Act of 1968.

A three-count indictment was returned against Stribling in the United States District Court for the Western District of Washington, Southern Division, on March 9, 1966, charging him with evasion of income taxes in the amount of $35,300.10, for the years 1959, 1960 and 1961. On April 21, 1966, on his motion, the District Court transferred the case to the United States District Court for the

Northern District of Ohio, Eastern Division, in which Division Stribling resided.

Stribling filed a motion to suppress evidence, which motion was granted by the Court. We reverse.

Stribling was engaged in the business of training, buying and selling horses which he raced and on which he bet, at various race tracks throughout the country. He also trained jockeys, entered into contracts with them, and sold their contracts.

In the latter part of December, 1962, IRS commenced a full scale investigation of a jockey who rode for Stribling, for failure to file income tax returns for 1959, 1960 and 1961.[1] Special Agent Hunter, of Louisville, Kentucky, who conducted the investigation, interviewed the jockey and learned that he had been living on Stribling's farm in Mechanicstown, Carroll County, Ohio, since late in 1957; that from the time he started riding for Stribling he turned over to Stribling almost every dime of his earnings except for a few living expenses; that these funds were handled for him by Stribling, who deposited them in a trust fund which he could withdraw only with Stribling's consent until he reached the age of 21 years; and that he was under contract with Stribling. Hunter was of the opinion that he (Hunter) could not make a proper investigation of the jockey without interviewing Stribling.

Hunter sent collateral requests to the Cleveland Field Office of the Intelligence Division and to other Districts, requesting information about the jockey. The request to Cleveland was assigned to Special Agent Auerbach, who requisitioned all tax returns filed by Stribling in the Cleveland District. The requisition came back, marked "No Returns". Auerbach was interested in Stribling be-

---

[1] The jockey's name was not made a part of the record, at the request of the Government.

cause of his close relationship with the jockey. Auerbach reported to Hunter that he could not locate Stribling's tax returns for the years 1960 and 1961, and asked Hunter to determine where Stribling had filed his returns for those years.

On March 20, 1963, Hunter went to Stribling's farm at Mechanicstown, Ohio, and, in Stribling's absence, left a summons requiring him to appear at the offiice of the Intelligence Division in Canton, Ohio, on April 15, 1963. Attached to the summons was a note requesting Stribling to call Hunter at his earliest convenience. Stribling telephoned Hunter from Providence, Rhode Island, where he was racing, and an arrangement was made for Hunter to fly there to meet him on March 28.

At that meeting Hunter told Stribling that he was requested to answer questions about the jockey, and that Stribling had a right to refuse to answer any questions which might tend to incriminate him. He was not advised that he was under investigation by IRS or that he had a right to have an attorney. He was interrogated, and signed a written statement about the jockey. Stribling was also asked whether he had filed income tax returns for the years 1959, 1960 and 1961. His answer was that he had filed returns for those years in the state of Washington.

Several months after the Hunter interview, Stribling consulted Stewart O. McHenry and Edgar Jones, attorneys at law, of the law firm of Amerman, Burt, Shadrach, McHenry and Jones, of Canton, Ohio. Upon their recommendation, Ronald Graves, an accountant, was employed to prepare amended income tax returns and a net worth statement of Stribling. Graves was a former Internal Revenue agent in the Canton Audit Division. The amended returns and net worth statement were prepared and delivered by Attorneys McHenry and Jones to Agent Beal

of the Canton Audit Division, together with a letter of transmittal.[2] The returns were assigned for routine audit to Internal Revenue agent George Kast on October 23, 1963, by Mr. Brownfield, his superior in the Canton Audit Division.

Counsel for Stribling, in his brief, states the reason why Stribling consulted counsel and an accountant:

> "In the meantime, following up on conversations he had had beginning in late 1962 and continuing into the spring of 1963 with a close friend of his in California whom he had known for many years, Stribling consulted an Ohio attorney, Stewart McHenry. Stribling had been under the impression that winnings from bets or proceeds from the sale of horses did not have to be reported as long as they were reinvested in his horse-racing business. It was in talking to his California friend that it first came to Stribling's attention that he may not have been reporting income properly on his tax returns. After Stribling consulted attorney McHenry, it was determined that an accountant (Graves) would be employed to inspect Mr. Stribling's records, reconstruct his income as best they could, and prepare amended returns." (Brief at 7)

In answer to questions propounded by the Court, Attorney McHenry testified:

> "Q Before you get further into the subject matter, did you have any conference with Mr. Stribling, either alone or in the presence of other persons, concerning his answering questions put to him by Mr. Kast or his right to refuse to answer questions?

---

[2] Attorney McHenry, who testified at the hearing on the motion to suppress, did not say why he left the returns with the Audit Division in Canton instead of filing them with the District Director of Internal Revenue in the Cleveland District, where the taxpayer resided, as required by Treasury Regulations § 1.6091-2 (1959).

"A No, your Honor. That was never discussed, because we took the position that amended returns should be filed and a forthright, open discussion should be had regarding anything that related to those returns. And by 'we,' I mean Mr. Jones and myself.

"Q Did you then advise Mr. Stribling to answer any questions that were put to him?

"A Yes. We encouraged him to answer everything.

"Q And on that general subject—incidentally, would that have occurred that same day or some prior date?

"A You mean our advice to answer anything?

"Q Yes. Yes.

"A From the time that Mr. Kast first appeared upon the scene.

"We likewise had encouraged Mr. Stribling to be as cooperative and as forthright and draw upon his memory, do everything he could to help Mr. Bruner and Mr. Graves reconstruct his income and prepare his returns" (App. 296)

Mr. McHenry elaborated further in response to questions asked by Government counsel:

"Maybe the advice that we had given him, the way to proceed here was—maybe it was bad advice. But it was the best advice that we knew how to give him. By 'we', Mr. Jones and I, with whom I was in perfect accord.

"I thought the best way to do this thing—this is the country lawyer approach. I thought the best thing to do was to be as absolutely cooperative and as open and free with every bit of information and not to withhold anything from the Department. I took the position that the Department wanted to be informed and that they had the right to be informed, and with all due respect to Mr. Stribling, I thought that was the best advice that I could give him." (App. 301)

Agent Kast commenced his audit about November 1. He contacted Stribling and told him that he (Kast) was

assigned to the case and would like to meet with him and his representatives. Stribling referred Kast to his attorney, Mr. McHenry.

On November 19, Kast met with Stribling, McHenry and Graves at Stribling's farm. Kast testified that he presented his credentials and that Stribling was "aware" that he was making an examination of Stribling's tax returns.[3] During this interview and during another one which took place on December 27, 1963, Stribling made incriminating statements, and he and his representatives turned over to Kast incriminating documents. Kast did not advise Stribling of the possibility of criminal prosecution or of his constitutional rights. Stribling was represented by counsel at all of the conferences except one, which was an afternoon continuation of a morning session. It is not claimed that any incriminating statements were made during that afternoon.

Kast testified that he did not know of the investigation of Stribling by Special Agents of the Intelligence Division, which commenced in January, 1963. The Court in his oral opinion stated: ". . . I believe [Kast] did not know. . . ." On February 20, 1964, Kast referred the case to the Intelligence Division for possible criminal investigation. Kast did not learn that the Intelligence Division had been investigating Stribling until Special Agent Auerbach called him on the telephone on March 4, 1964.

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[3] Stribling testified that Kast told him that his investigation was to determine the correctness of his amended returns from 1959 to 1962. The Court credited Stribling's testimony in this respect. We think it is clear that without it Stribling also was "aware" of this fact, as Kast testified, because Stribling knew that his attorneys had left the amended returns and the net worth statement with the Canton Audit Division. He could hardly expect that the Audit Division would accept his amended returns without an investigation into their correctness. In any event, if Kast made the statement, it was unquestionably true.

The evidentiary hearing conducted by the District Judge commenced on March 20, 1970, and ended on April 3, 1970. The transcript contains 596 pages; 71 numbered exhibits, consisting mostly of documents, papers and records taken from the files of the Intelligence and Auditing Divisions, were received in evidence. There is no question but that the District Judge gave careful and conscientious consideration to the case. At the conclusion of the evidence the Court dictated into the record and oral opinion which contained his findings and conclusions:

First, the Court ordered the Hunter interview suppressed. This interview concerned the jockey; the only portion thereof relating to Stribling was that part when he disclosed, in response to a question, the fact that he had filed his income tax returns in the state of Washington. As to this, the Court in its opinion stated:

> "The filing of the amended returns on August 23, 1963 brought about several results. It now supplied the Internal Revenue Service with information as to where he had filed his income tax returns in the years 1955 through 1962.
>
> "Hence, whatever leads, if any, that may have flowed from the improper eliciting of the same information from George Y. Stribling in the Hunter interview now certainly ceased." (App. 332)

The Government in its appeal does not question this action taken by the District Court. Hence, we see no point in discussing it further, although Stribling in his brief makes a big issue of it.[4]

---

[4] Stribling, in his brief, even argues that the Kast audit was merely a continuation of the investigation by Special Agents Hunter and Auerbach. This is not true as it was the voluntary act of Stribling, his lawyer McHenry and his accountant Graves, in filing the amended returns and net worth statement with the Canton Audit Division, that brought Kast into the case.

Second, the Court ordered suppressed —

> ". . . all admissions made to Agent Kast orally or in writing by Mr. Stribling or his agents with his authority and consent and all documentary records that were produced by the defendant and made available by him or his agents to Revenue Agent Kast." (App. 338)

It is this part of the order which the Government in its appeal contends is erroneous. It was the theory of the District Court that the Government should have disclosed to Stribling the facts that the Intelligence Division was investigating him, and that a criminal prosecution might result therefrom; and that Agent Kast, who was making the audit, misled Stribling and his attorney.

In his oral opinion the Court found:

> "On this record, it is found and determined that both Mr. Stribling and his counsel were misled by Mr. Kast and were lulled into believing that the disclosures being made would be used solely to determine the correctness of his amended returns. In the words of White, supra, they were affirmatively misled into believing that the investigation was exclusively civil in character and would not lead to criminal charges." (App. 337)

In our opinion, this finding is not supported by substantial evidence and is clearly erroneous. It is contradicted by a subsequent finding that Agent Kast did not even know of the investigation by the Intelligence Division. The "misleading", so-called, was the alleged statement made by Agent Kast to Stribling, his lawyer and accountant, of a fact which they already knew, namely, that he (Kast) had been assigned to make an investigation of the correctness of the amended returns. Such a statement, if made, was true.

Kast did not misrepresent anything to Stribling, his lawyer or his accountant, and did nothing to mislead them. During the interviews conducted by Agent Kast, the latter could not very well advise Stribling, his attorney and accountant, that the Intelligence Division was conducting an investigation, because Kast had no knowledge of that fact. Kast made them no promises. There was nothing coercive in anything which Kast did or said. The entire investigation was conducted without rancor or threats, but rather, in a friendly atmosphere, in the presence of Stribling's lawyer and accountant. Agent Kast cannot be blamed for the decision which Stribling, his lawyer and accountant voluntarily made in July, 1963, to make a clean breast of everything, to file amended returns and a net worth statement, and to co-operate with the Government in determining the correctness of the amended returns, obviously in the hope that no criminal prosecution would result. Kast was not assigned to investigate the amended returns until October 23, 1963, and had never heard of the case until after the amended returns were filed.

It is not claimed that anyone connected with the Government had anything to do with the decision made by Stribling and his representatives to file amended returns and to make a clean breast of everything.

Nor can the Government be blamed if Stribling neglected to tell his lawyer and accountant about the Hunter interview. Stribling testified on cross-examination that he did inform Mr. McHenry as to the Hunter interview:

> "Q Now, Mr. Stribling, you testified that Mr. McHenry did not advise you of your rights.
>
> "Had you informed Mr. McHenry that you had been interviewed by Mr. Hunter?
>
> "A Yes.

"Q And did you have any extensive conversations with Mr. McHenry as to the nature of your interview by Mr. Hunter?

"A Yes.

"Q And did you advise Mr. McHenry that Special Agent Hunter asked you whether or not you personally had filed income tax returns?

"A I don't recall. I don't recall.

"Q You don't recall.

"Do you remember Mr. Hunter asking you whether or not you had filed?

"A Yes.

"Q I see. And do you remember your answer to his question of whether or not you filed income tax returns?

"A Yes.

"Q And what was that answer?

"A That I had filed my income tax in the State of Washington.

"Q I see. Do you recall whether or not you advised Mr. McHenry that you told Mr. Hunter that you had filed income tax returns in the State of Washington?

"A I don't recall that." (App. 285-286)

McHenry, when questioned as to whether Stribling advised him of the Hunter interview, testified, "No, I don't believe so."

It does seem to be quite a coincidence that it was not until after the Hunter interview that Stribling consulted counsel and decided to file amended returns and a net worth statement, and to make a clean breast of everything. We are cognizant of Stribling's contention that he was motivated by advice given to him by his California friend (rather than what took place at the interview with Special Agent Hunter), to engage an attorney and accountant and to file amended returns and a net worth statement. In any event, if Stribling chose not to advise his attorneys and

accountant of the Hunter interview, he can fault no one except himself for that decision.

It is argued on appeal that Agent Kast should have advised Stribling of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), to remain silent, to furnish no documents, papers or records, and to have counsel. The fact is that it was unnecessary to advise Stribling of his right to counsel because he had already employed counsel and an accountant, both of whom were present at the interviews. Agent Kast was not required to assume that the attorney and accountant representing Stribling did not properly advise him of his rights, or that they did not intend to do what they did.

An Internal Revenue Agent assigned to make a routine audit ought to be cirumspect in interviewing a taxpayer. The agent should not assume that such a taxpayer has cheated the Government and offend him by warning him as to the possibility of criminal prosecution and advising him as to his constitutional rights.

Reliance on *Miranda* is misplaced as its guidelines were limited to in-custody interrogations. This was made clear in *Mathis v. United States,* 391 U.S. 1 (1968), which applied *Miranda* to an interrogation by a Revenue Agent of a prisoner in state custody.

Stribling was never in custody and any information which he or his attorney and accountant divulged to Agent Kast was wholly voluntary. In the absence of fraud or misrepresentation, statements obtained by Special Agents are admissible. *Muse v. United States,* 405 F.2d 40 (8th Cir. 1968), *cert. denied,* 393 U.S. 1117 (1969); *Cohen v. United States,* 405 F.2d 34 (8th Cir. 1968), *cert. denied,* 394 U.S. 943 (1969); *White v. United States,* 395 F.2d 170 (8th Cir. 1968); *cf. United States v. Sclafani,* 265 F.2d 408 (2d Cir.), *cert. denied,* 360 U.S. 918 (1959).

All Circuits, except the Seventh[5], have held *Miranda* inapplicable to tax investigations conducted either by a Special Agent or by an Agent employed in the Auditing Division where the taxpayer is not in custody.

The cases are collected in our recent opinion in *United States v. Miriani,* 422 F.2d 150, 153-154 (6th Cir. 1970), *cert. denied,* 399 U.S. 910 (1970), and in opinions of the Third and Fifth Circuits, in *United States v. Jaskiewicz,* __ F.2d __ (3rd Cir., No. 18,387, decided Sept. 28, 1970), and in *United States v. Prudden,* 424 F.2d 1021 (5th Cir. 1970). See also *United States v. Maius,* 378 F.2d 716, 718-719 (6th Cir.), *cert. denied,* 389 U.S. 905 (1967); *Biggs v. United States,* 246 F.2d 40 (6th Cir. 1957), *cert. denied,* 355 U.S. 922 (1958).

In *Miriani* we said:

> "The defendant was never in custody when being interrogated by the agents of the Internal Revenue Service. Where a person is not under arrest or under duress in the legal sense of the term, it is not necessary to the admission of his statements in evidence that he be warned of his constitutional rights by the agents interviewing him . . . [Citing authority] And this is true even when the examination for the purpose of determining civil tax liability takes on criminal aspects." [Citing authority] 422 F.2d at 153, 154.

As was well stated in *Jaskiewicz, supra:*

> "There was no affirmative duty on the part of the Government to disclose to appellant the extent and nature of its investigation. *Hoffa v. United States,* 385 U.S. 293, 303 (1966); *Lewis v. United States,* 385 U.S. 206, 209 (1966)."

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[5] *United States v. Dickerson,* 413 F.2d 1111 (7th Cir. 1969). The Court limited its decision prospectively only to admissions made and documents turned over after the date of the opinion.

In *United States v. Sclafani,* 265 F.2d 408 (2d Cir. 1959), the panel which was comprised of Circuit Judges Medina, Lumbard and Burger[6], held:

> "The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as may be incident to a voluntary disclosure. We hold that Sclafani was so apprised by the warning inherent in the request when Agent Sonkin identified himself and disclosed his purpose to audit certain returns of the corporation." *Id.* at 415.

In *Prudden, supra,* the Court said:

> "Prudden points to the failure of Special Agent Cohen to tell him that his function was to investigate for criminal fraud. All Cohen was required to do by the then existing Internal Revenue Service Requirements was to tell Prudden that he was a Special Agent and show Prudden his credentials. This he did. He in no way concealed his true identity. He could not have affirmatively misled Prudden as to the function of the Intelligence Division or as to the duties of a special agent, since neither of these subjects were ever discussed. Silence can only be equated with frau[illegible] where there is a legal or moral duty to speak or [illegible]here an inquiry left unanswered would be intentionally misleading. None of these factors were present here." 424 F.2d at 1032.

In *United States v. Squeri,* 398 F.2d 785, 788 (2d Cir. 1968), the Court said:

> ". . . [T]he information that a taxpayer's returns are under audit gives notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they speak to him."

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[6] Sitting by designation.

See also *Spahr v. United States*, 409 F.2d 1303, 1306 (9th Cir.), *cert denied*, 396 U.S. 840 (1969).

On the face of each income tax return filed by Stribling in Washington, in which he did not report all of his income, was the warning:

> "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete."

The District Court, in its opinion, stated:

> "Defendant relied principally to support this branch of their motion on United States v. Lipshitz, 132 Federal Supplement 519, Eastern District of New York, 1955; U.S. v. Wheeler, 149 Federal Supplement 445, although this case was reversed on other grounds by the Third Circuit; and United States v. Guerrina, 112 Federal Supplement 127, Eastern District of Pennsylvania, 1953." (App. 336)

The same authorities were relied on by Stribling here. The trouble with these authorities is: *Lipshitz* was overruled by the Court of Appeals of the Second Circuit in *Sclafani*, 265 F.2d 408, *cert. denied* 360 U.S. 918 (1959).[7] *Guerrina* was later revised on application for rehearing, 126 F.Supp. 609, 610, 611 (1955). *Wheeler*, 256 F.2d 745 (3d Cir. 1958), not only reversed the decision of the District Court, but vacated the suppression order.

Thus the contentions of Stribling were not supported by authority. They are in conflict with decisions of this Court in *Miriani, Maius* and *Biggs*.[8]

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[7] We think the Court actually overruled the decision of the District Court reported in 132 F.Supp. 519, which ordered suppression, rather than 117 F.Supp. 466, which merely granted a hearing on the motion to suppress.

[8] The dissenting opinion likewise does not comport with the rule in these cases. It would place a duty on the part of the Gov-

(*Continued on following page*)

Stribling and his attorney McHenry testified that if they had known of the investigation conducted by the Special Agents, they would not have furnished any information to Agent Kast. These self-serving statements, made long after the investigations had been completed, do not militate against the rule that the Government owed them no duty to inform them of the nature and extent of its investigation.

The fact that an investigation was conducted by Special Agents does not mean that it is limited to a criminal tax investigation. One reason for the investigation may be for the purpose of determining tax liability. Not all investigations by Special Agents result in criminal prosecutions.

Recently we upheld the validity of summons issued by Special Agents under 26 U.S.C. § 7602 for the dual purpose of determining tax liability and investigation of possible tax fraud. *United States v. Held,* __ F.2d __ (6th Cir. No. 20,672, decided December 17, 1970); *United States v. Artman,* __ F.2d __ (6th Cir. Nos. 20,357, 20,358, decided Dec. 17, 1970).

The order of suppression is vacated in the respects stated in the opinion.

CELEBREZZE, Circuit Judge, Dissenting. I would affirm the District Court's order suppressing all information gleaned by the United States as a result of its interviews between Agent Kast and the Appellee.

It is well established that agents of the Internal Revenue Service may not use fraud, trickery or deceit to obtain consent to examine documents or conduct a search.

(*Continued from following page*)

ernment to advise a taxpayer of an investigation by Special Agents and the nature and extent thereof. It equates failure to so advise with fraud, misrepresentation and trickery.

Such actions would vitiate the voluntary character of any evidence gained through such tactics. *Gouled v. United States,* 255 U.S. 298, 304-305 (1921). This rule has been affirmed in recent cases by the United States Courts of Appeals from the Second, Fifth, Eighth and Ninth Circuits. *See, United States v. Sclafani,* 265 F.2d 408, 414 (2d Cir.) *cert. den.* 360 U.S. 918 (1959); *United States v. Prudden,* 424 F.2d 1021, 1032-33 (5th Cir. 1970); *Cohen v. United States,* 405 F.2d 34, 40 (8th Cir. 1968) *cert. den.* 89 S.Ct. 1274 (1969); *Spahr v. United States,* 409 F.2d 1303, 1306 (9th Cir.) *cert. den.* 396 U.S. 840 (1969). This Court has also acknowledged the validity of the rule laid down in *Gouled* that incriminating evidence is not admissible if obtained under a promise of immunity or through fraud or misrepresentation on the part of the Government. We held:

> "It is settled law that the privilege against self-incrimination does not preclude the admission into evidence of documents voluntarily given to a revenue agent in a civil tax investigation without promise of immunity and in the absence of fraud or misrepresentation, even though the taxpayer did not anticipate the criminal prosecution. [Cites omitted]
>
> "Whether the books were voluntarily surrendered by the Appellant or were obtained under a promise of immunity or through fraud or misrepresentation on the part of the Government is a question of fact." 246 F.2d at 44.

I believe that based upon the facts of this case, there is clear and convincing evidence to support the District Court's factual finding that the Appellee "and his counsel were misled by Mr. Kast and were lulled into believing that the disclosures being made would be used solely to determine the correctness of [Appellee's] . . . amended returns." (Appendix at 337).

In February, 1963, the Intelligence Division of the Internal Revenue Service began an investigation of the Appellee with a view toward determining whether or not he should be criminally prosecuted for violations of the Internal Revenue Code. Under compulsion of a summons which was issued pursuant to 26 U.S.C. § 7602 (1964) and which purportedly concerned an employee of the Appellee, the Internal Revenue Service sent out a Special Agent to interview the Appellee. That interview which took place in March, 1963, set off a chain of investigations of the Appellee's activities in Chicago, Illinois, Seattle, Washington, Cincinnati, Ohio, and Kentucky. By late August, 1963 the Internal Revenue Service Assistant Regional Commissioner in Cincinnati, whose jurisdiction covers a five state area including all of Kentucky and Ohio, was sent a report on the Internal Revenue Service's widespread investigation of Appellee's activities. While this investigation was taking place, the Appellee filed amended returns.

In response to the filing of Appellee's amended returns, the Canton office of the Internal Revenue Service sought to requisition the Appellee's tax returns and was informed that the material requested was in the hands of a Special Agent of the Intelligence Division for the past several months. There is no indication in the record that the Canton office made any further inquiry as to the status of the Intelligence Division's investigation into the Appellee's affairs. Indeed, the Canton office did not even inquire to its Regional Office in Cincinnati concerning the status of the Internal Revenue Service's investigation on the Appellee. Had the Canton office followed up on this matter, they would have been made aware of the multi-state investigation for tax fraud which the Intelligence Division was pursuing. Instead, the Canton office ordered

Agent Kast to interview the Appellee with respect to his amended tax returns for the years 1959-62.

Agent Kast met with the Appellee and his tax lawyers several times in November and December, 1963 and affirmatively represented to the Appellee that his purpose in conducting those interviews was to determine the correctness of Appellee's *amended* returns for the years 1959-62. Agent Kast did not express any intention to audit Appellee's *original* returns or to gain facts which might be used against the Appellee in a criminal prosecution based on his *original* returns. While Agent Kast may have believed his statements to the Appellee were true because his own superiors did not inform him of the continuing criminal investigation, there can be no question these affirmative statements misrepresented the position of the Internal Revenue Service with regard to the Appellee. The Appellee testified under oath that he would never have volunteered the records or information he provided Agent Kast had he known such information could have been used against him in a criminal prosecution or had he known that the Internal Revenue Service had begun investigating the possibility of a criminal indictment based on his *original* returns several months before the Kast interviews. Appellee testified he offered the records and volunteered the information he gave so that the Internal Revenue Service could fairly determine the accuracy of his *amended* returns as Agent Kast had indicated to him was the purpose of his visit.

I believe the record in this case provides "clear and convincing" evidence to support the District Court's finding that the Appellee and his counsel were affirmatively misled and deceived into believing that the Internal Revenue Service's purpose in seeking information was in the pursuit of an exclusively civil investigation which would

not lead to criminal charges. The majority concedes that Agent Kast affirmatively represented to the Appellee that the limited purpose of his audit and interviews was to determine the correctness of Appellee's amended returns. Those statements by Agent Kast served to affirmatively mislead the Appellee into volunteering information which he would not otherwise have given. The fact that Agent Kast was not informed by his immediate superiors at the Canton Field Office or by his superiors in the Cleveland District Office or in the Cincinnati Regional Office that a continuing nationwide criminal investigation of Appellee had been in progress for a period of several months cannot be used as a shield if in fact his misleading statements deceived the Appellee. The District Court so found. An agent of a field office of the Internal Revenue Service must be held answerable for information which his immediate superiors should have discovered and which his district and regional offices clearly possessed. The District Court's order suppressing all evidence gleaned by the Internal Revenue Service from the Kast interviews should be affirmed.

APPENDIX B.

JUDGMENT OF THE COURT OF APPEALS.

(Filed February 10, 1971.)

No. 20,453

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

GEORGE Y. STRIBLING,

Defendant-Appellee.

BEFORE: WEICK and CELEBREZZE, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT.

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,

Clerk.

APPENDIX C.

OPINION OF THE DISTRICT COURT.

Criminal Action No. CR 66-149.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE Y. STRIBLING,
Defendant.

OPINION OF HONORABLE WILLIAM K. THOMAS
AT 3:25 P.M., FRIDAY, APRIL 3, 1970.

The Court: Gentlemen, I proceed to consider and rule upon the motion to suppress in its several branches as it has been presented here by Defendant George Young Stribling.

I first consider the motion to suppress Exhibit 3, the Hunter interview. I deal with this phase of the motion in terms of the validity and the legality of the summons that was issued by Agent Hunter as a delegate of the Secretary under Section 26 U.S.C. 7602.

It will be assumed that to the extent that Mr. Stribling was being questioned concerning his financial relations with Mr. X, the summons was validly issued. At least for present purposes, its validity to that extent will be presumed. Thus, presumably, the statement might have been used to refresh Mr. Stribling's memory had he been called as a witness in connection with any prosecution of Mr. X.

But that, of course, is not the question that I have

before me. The question here is: What about the use of this statement against this defendant in this criminal prosecution?

As a result of a collateral request from A. N. Hunter, a Special Agent of the Louisville District of IRS, Intelligence Division, a Special Agent of the Cleveland District, namely, Sol Auerbach, had gathered records concerning Mr. X's activities as a jockey at race tracks in this country. He submitted a partial reply dated February 25, which, together with its attachments, related to the activities of jockey X during the years 1959, 1960, and 1961.

The report ended with the statement "It is requested that Mr. Stribling be questioned as to whether he filed income tax returns for the years 1957 through 1961. He has owned the farm at Mechanicstown, Ohio since 1955."

Just before that, in a reference to the 1961 American Racing Manual, Mr. Auerbach stated "This book also lists George Stribling's record as follows:

"First: 20.
"Second: 14.
"Third: 16.
"Earnings: $25,395."

These excerpts from the February 25 reply must be read together with an excerpt from the earlier reply in January when he stated that a search of the records of the Cleveland District indicated that Mr. Stribling did not file income tax returns for 1960 and 1961.

Thus, at the time of the A. N. Hunter interview of George Stribling on March 28, 1963, he was clearly, and I do so find, under suspicion of possible violation through failure to file returns.

Hence, when Special Agent Hunter questioned him as to whether he had filed returns, he was employing the compulsory appearance of Mr. Stribling before him to

seek evidence to possibly incriminate Mr. Stribling in connection with a possible prosecution against him for violation of the income tax laws.

It is said that the sole purpose of a tax investigation by use of a summons under Section 7602 is to obtain evidence for use in a civil prosecution and that if the sole purpose is to obtain evidence for use in a criminal prosecution, the purpose is not legitimate and enforcement of an IRS summons should be denied.

That is a paraphrase and not a quote. But it comes from *Wild vs. United States,* Ninth Circuit, 1966, 362 Federal 2d 206.

It is true that a later case of that circuit, *Howfield, Inc. vs. United States,* Court of Appeals, California, 1969, 409 Federal 2d 694, seems to hold that a summons may be used even where the purpose is allegedly to uncover crime when no criminal case is actually pending against the taxpayer. A criminal case there is equated with a criminal prosecution following an indictment.

Nevertheless, as I understand the law of the Sixth Circuit as expressed in *Hinchcliff vs. Clarke,* C.A. 6, 1967, 317 Federal 2d 697, I understand that case to say that no information secured through a summons issued to an individual may be employed against him in a criminal prosecution.

It is true that Stribling could have refused to obey the summons and this would have put Special Agent Hunter to the necessity of seeking enforcement under 26 U.S.C. 7604. Yet Stribling's failure to use this means did not waive his right now to move to suppress any portion of that interview that now the Government seeks to use against him in this criminal prosecution. A present motion to suppress all or part of the Hunter interview is comparable to a motion to suppress evidence obtained pursuant

to an inadequate or defective search warrant or its supporting affidavit.

It is concluded and determined with reference to this branch of the matter that to the extent that the interview is sought to be used against this defendant in a criminal prosecution, the interview is the product of an illegal use of the power of summons under 7602. It cannot serve to compel him to testify against himself.

Yet even if the summons were properly issued to George Y. Stribling, the question would arise whether an adequate warning against self-incrimination was given to him.

The warning that was given to him was expressly prefaced by the statement--I believe this is a correct quote—"You have been requested to come to this offiice to answer questions and furnish data concerning the Federal income tax liability of Mr. X for the years 1959, 1960, and 1961, inclusive."

Moreover, Mr. Stribling testified without contradiction that before the taped interview began, he quotes Mr. Hunter as saying, in the exact words of Mr. Stribling's testimony, "This investigation does not concern me."

Thus, certainly, he was led to believe that no questions would be asked of him that related to his own tax liability and necessarily to his own possible incrimination by reason of any tax liability.

Hence, the warning that follows, taken in the context that I have just described, is not deemed to be broad enough to cause the voluntary answering that followed to waive his right against self-incrimination in any criminal proceeding thereafter brought by the United States to prosecute him for violation of the income tax laws.

Accordingly, I determine that Exhibit 3, the Hunter interview, may not be used by the Government either as

an admission against interest, a voluntary statement or confession, or in any cross-examination of the defendant should he testify at this trial.

Going on to another branch of this motion. In defendant's motion to suppress, it is stated in part—and I am quoting from page 6 of the original brief—"The form and nature of the misrepresentation which began with the initial interview of George Y. Stribling on March 28, 1963 changed after August 22, 1963, when the defendant took it upon himself to file amended tax returns for the years 1955 through 1962. From the date the amended returns were filed, the Internal Revenue Service represented to the defendant, George Y. Stribling, and to the defendant's attorney, Stewart McHenry, and to defendant's accountant, Ronald Graves, that the investigation was pertinent to ascertaining the correctness of the amended returns filed by the defendant. However, in fact, the investigation was merely a continuation of the original criminal investigation which was instituted sometime prior to March 20, 1963."

And on the next page, page 7, this portion of the brief concludes with this statement: "The defendant, George Y. Stribling, was intentionally misled by the misrepresentation and guile of the Internal Revenue Service from the time of the initial interview with Special Agent Hunter which took place on March 20, 1963."

The filing of the amended returns on August 23, 1963 brought about several results. It now supplied the Internal Revenue Service with information as to where he had filed his income tax returns in the years 1955 through 1962.

Hence, whatever leads, if any, that may have flowed from the improper eliciting of the same information from

George Y. Stribling in the Hunter interview now certainly ceased.

Secondly, the filing of the net worth report disclosed the names of banks at which the defendant maintained accounts for designated years and reported the deposits in these accounts. Other financial data in summary form is given in this net worth report.

Certainly, this information therein enumerated provides the Government with leads that it may legitimately use in pursuing that information and any documentation of that information.

The filing of the amended returns also precipitated an extensive audit of the taxpayer's financial affairs for the years at least as early as 1959, and probably earlier than that, through 1962.

The taxpayer, on July 1, 1963, first met with counsel in Canton, and apparently they were then engaged to deal with his tax problems. At counsel's suggestion, Canton CPA's were also engaged. The taxpayer, with the advice of his attorneys and, presumably, his accountants, determined to and did prepare a report of taxable income computed under the net worth method for the years 1955 through 1962. This is the document that was filed with his amended returns.

On October 23, Mr. John Brownfield, the Group Supervisor of the Audit Division, Canton, Ohio, the Cleveland District of IRS, assigned the auditing of the defendant's amended returns to Revenue Agent Kast.

On November 5, Mr. Kast called Mr. Stewart McHenry, one of the attorneys representing Mr. Stribling.

Mr. McHenry then, after several calls to Mr. Stribling and to Mr. Graves, set up the first joint conference for November 19, 1963. This conference took place at the

Stribling farm in Carroll County, Ohio, on that date, November 19, 1963. At least in the morning, those present included Mr. McHenry, Mr. Stribling, Mr. Graves, and Revenue Agent Kast.

The evidence also shows that a later conference occurred on December 27, 1963 attended by the same persons.

There were other telephone conferences, but these, I believe, are the only person-to-person conferences in the year 1963 involving these named parties.

At certain of these conferences, canceled checks, bank deposit records, and other original financial records of the defendant were disclosed and made available to Agent Kast. Copies of these were obtained by him and, as far as I know, remain in the possession of the Internal Revenue Service.

Also, Mr. Stribling, Accountant Graves, and perhaps his lawyers answered whatever questions were asked by Agent Kast.

For example, on the 19th, Mr. Stribling stated, as appears in Agent Kast's memorandum of that conference, as follows. Mr. Kast has put Mr. Stribling's words in quotes.

> "Winning from bets and selling of horses not reported because money was reinvested in property."

At another point in this same memorandum, the amounts of his bet winnings at the tracks on certain days and for certain periods are listed.

And then following that, again in quotes, appears "Bet money at race track. Nowhere else."

Mr. Stribling took the stand and was asked a series of questions, and I want to refer to some of them.

> "Question: When, to the best of your memory, were you interviewed by IRS agent Kast?

"Answer: In the fall of 1963.

"Question: Now, at that time, were you informed by Agent Kast or any other person that you were being investigated by IRS for possible criminal prosecution?

"Answer: No.

"Question: Were you informed by Agent Kast or anyone else at that time that anything you said or any records you furnished could be used in a criminal prosecution of George Stribling?

"Answer: No.

"Question: Were you informed at that time by Agent Kast or anyone else that you had a constitutional right to remain silent and to refuse to answer any questions and to refuse to produce any documents which might tend to incriminate you?

"Answer: No.

"Question: Did Agent Kast inform you, Mr. Stribling, of the nature of his investigation?

"Answer: Yes.

"Question: What did Agent Kast say regarding his investigation of you?

"Answer: He said it was to determine the correctness of my amended returns for the years of 1959 through 1962."

This testimony attributed to Agent Kast is not contradicted in any of the testimony that Agent Kast gave when he appeared here in Court. Moreover, Agent Kast was not recalled to the stand to refute the affirmative representations that I have just quoted.

In addition, as I have indicated—and it is apparently not in dispute—Agent Kast gave no warnings, no admonitions of any kind.

This absence of warnings and the absence of contradiction to Mr. Stribling certainly tends to corroborate the truth, and I do find that, in fact, Agent Kast did make the statement that is attributed to him by Mr. Stribling.

The testimony of Attorney McHenry does not touch on the point of what Mr. Kast may have said. But the whole content and character corroborates Mr. Stribling's statement.

Thus, Mr. McHenry, among other things in his testimony, was asked:

> "Question: Was there any discussion between you, Mr. Jones, and Mr. Stribling that in any way related to the possibility of any criminal prosecution that might flow or could be connected with what you were doing with him? Was this discussed in any way?
>
> "Answer: Well, first of all, your Honor, we knew of no criminal investigation at that time, and it wasn't until a later time when we—someone from the Intelligence Section came in question until we thought of that."

And then later on

> "Question: Well, let us go back to the 19th of November. I was inquiring whether there was any discussion that you had with Mr. Stribling—
>
> "Answer: Yes, sir.
>
> "Question: —prior to meeting with Mr. Kast as it related to either the manner of questioning, the permission to question, any restriction on questioning, and so on.
>
> "Answer: None whatsoever, your Honor. In fact, we thought—Mr. Jones and I thought that the best thing to do here was to be as open and forthright and as cooperative as could be."

To me, hearing that testimony and reading it again as it was actually given corroborates in my mind that Mr. McHenry believed that this was a civil proceeding only and it had no criminal overtones and it would not involve his client in any criminal prosecution if he made a complete revelation of his documentary evidence as well

as admissions that he might make to any questions put to him by Mr. Kast.

Mr. Stribling was further asked these questions.

"Question: Now, did you answer questions, Mr. Stribling, and give information and authorize the production of your records, checks, and other documents to this Agent Kast?

"Answer: Yes.

"Question: Would you have done so if you had known or been informed that the information you gave could be used in a criminal prosecution of George Stribling?

"Answer: No.

"Question: Would you have done so if you had known that the IRS had started investigating you early in 1963?

"Answer: No.

"Question: Were you advised, Mr. Stribling, by your attorney prior to the time that you were interviewed by Agent Kast or at the time of the interview that you were already being investigated early in 1963 by IRS?

"Answer: No."

Defendant relied principally to support this branch of their motion on *United States vs. Lipshitz,* 132 Federal Supplement 519, Eastern District of New York, 1955; *U.S. vs. Wheeler,* 149 Federal Supplement 445, although this case was reversed on other grounds by the Third Circuit; and *United States vs. Guerrina,* 112 Federal Supplement 127, Eastern District of Pennsylvania, 1953.

The principle of these cases can be summed up in a quotation from *Cohen vs. United States,* an Eighth Circuit decision of 1968, 405 Federal 2d 34 at 36, where the Court of Appeals for the Eighth Circuit, though it refused to follow the *Turzynski* line of cases, went on to say this, and I am quoting from page 36:

> "While there is District Court authority for the view that Internal Revenue Service agents have an affirmative duty to inform a taxpayer that he is the subject of a criminal investigation in circumstances comparable to those here, the United States Courts of Appeals have uniformly held to the contrary. We follow the latter cases, but reiterate our warning in *White v. United States,* 395 Federal 2d 170, Eighth Circuit, 1968, that agents must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in character and will not lead to criminal charges."

On this record, it is found and determined that both Mr. Stribling and his counsel were misled by Mr. Kast and were lulled into believing that the disclosures being made would be used solely to determine the correctness of his amended returns. In the words of *White supra,* they were affirmatively misled into believing that the investigation was exclusively civil in character and would not lead to criminal charges.

How else can one explain how an honorable, competent lawyer—true enough not a criminal or tax lawyer necessarily, but an experienced lawyer—would advise his client to throw open completely all of his records and to provide information knowing that that very same information might later be used against him and cause him to be convicted in a criminal prosecution?

Now, it is nonetheless misleading because Mr. Kast may not have known and I believe did not know as Vaughn Chase, Group Supervisor, Intelligence, stated on March 23, 1964 in accepting Mr. Kast's referral "Knowledge of Mr. Stribling having failed to report all his income first came to this unit's attention in January, 1963 when Special Agent Auerbach was working a collateral request of the Louisville District on the tax liability of John F. X, a jockey sponsored by Stribling."

On the contrary. The preliminary investigation of Mr. Stribling carried on by Mr. Auerbach from January to August 29, 1963 and thereafter by the Washington District Intelligence Division sharpens the misleading edge of the affirmative statement of Mr. Kast that the purpose of the audit and the disclosures was to determine the correctness of the amended returns.

The preliminary investigative report of Agent Auerbach shows in one of the concluding sentences "The analyses previously introduced indicate acquisitions of equipment and horses and acquisitions and bank accounts far greater than the adjusted gross income shown on the tax returns."

This continuing investigation by the criminal investigators of IRS heightens the misleading character of Mr. Kast's statements that I have previously referred to.

Accordingly, the second branch of the motion is granted to suppress and to exclude from trial all admissions made to Agent Kast orally or in writing by Mr. Stribling or his agents with his authority and consent and all documentary records that were produced by the defendant and made available by him or his agents to Revenue Agent Kast.

I will withhold any orders as to any proscription of the fruits or products of the foregoing evidence that I am suppressing. However, if necessary, I will be able to consider such question in connection with the exercise by the Government of the burden that it must now assume to show that its proposed trial evidence is free from taint of the evidence I have heretofore suppressed.

Of course, it is clear that if the Government can show that its evidence was gained or can be gained from independent sources or independent leads, then to the extent that that can be shown, the Government meets

the burden and that evidence certainly may be received in support of its prosecution against this defendant.

That, gentlemen, completes the ruling, and I will be glad to meet with counsel informally here or otherwise to discuss our next step in this case.

Mr. Bauer: Your Honor, for the record, representing the Government, I would like to say that the Government's next step will be to analyze the ruling made by the Court today and then to consider its next step.

I would suspect that perhaps an analysis will be made in Washington and they may want to consider appealing this particular order. I can't say.

I will say it appears at this point that the Government was not prepared at this time to go forward with trial.

The Court: Well, on what basis? We can certainly allow a certain period of continuance without an indefinite continuance in view of the fact that we overruled the motion based on a ground of speedy trial, if you recall, and ordered the case set for trial.

Now, I would assume that within a very short period of time, you will be prepared to indicate.

Mr. Bauer: Oh, we would be, your Honor.

The Court: I am going to ask that you do that by next Tuesday or Wednesday.

Mr. Bauer: We can do that by next Tuesday or Wednesday, your Honor.

The Court: All right. Suppose we meet here again in court on Wednesday morning?

Mr. Bauer: Fine, your Honor.

The Court: At 9:30.

Mr. Bauer: Thank you very much.

The Court: And at that time, you can indicate what your plans are.

Close court, please.

(Court was adjourned.)

APPENDIX D.

JUDGMENT OF THE DISTRICT COURT.

(Filed April 9, 1970.)

Criminal Action Number CR66-149.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE Y. STRIBLING,
Defendant.

ORDER.

This matter came on for hearing on March 20, 1970, upon the eve of trial, on defendant's motion to suppress,

Upon the testimony, exhibits, arguments and the entire record,

IT IS ORDERED that the motion of the defendant to suppress is hereby granted pursuant to and as limited by the oral opinion given in open court on April 3, 1970.

/s/ WILLIAM K. THOMAS,
U.S.D.C. Judge.

APPENDIX E.

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATION INVOLVED.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954, Section 7602, 26 U.S.C. § 7602.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax

or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Internal Revenue Service, Statement of Organization and Functions, 65-2 Cum. Bull. Section 1118.6, at 948 (1965).

The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics, and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives, and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering, and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U.S. attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases.